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Maximalist Decision Making: When Maximalism is Appropriate for Appellate Courts

Lauren Cyphers

West Virginia University College of Law

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MAXIMALIST DECISION MAKING: WHEN MAXIMALISM IS APPROPRIATE FOR APPELLATE COURTS

I. INTRODUCTION: THE EFFECTS OF JUDICIAL MINIMALISM	611
II. BACKGROUND: DEFINING MINIMALISM.....	614
A. <i>Why Judicial Minimalism Makes Sense</i>	617
B. <i>A Minimalist Decision in Effect</i>	618
C. <i>When Minimalism Does Not Make Sense</i>	620
1. Successful Maximalist Decisions.....	622
2. Failed Maximalist Decisions.....	623
III. ANALYSIS: EFFECTIVE USE OF MAXIMALISM.....	626
A. <i>Maximalism Is Appropriate When Other Actors</i> <i>Are Implicated</i>	627
1. Obscenity Law	628
2. The Fourth Amendment.....	631
3. Abortion Legislation—A New Maximalist Decision Needed To Settle Roe?.....	633
B. <i>Mini-Maximalism—The Use of Maximalism</i> <i>After Minimalism</i>	636
1. Recent Title VII Decisions.....	638
C. <i>The Numbers</i>	641
IV. CONCLUSION	642

I. INTRODUCTION: THE EFFECTS OF JUDICIAL MINIMALISM

The Supreme Court of the United States is tasked with deciding to grant or deny a petition for certiorari for over 7,000 cases per year, totaling an average of 184 cases per week during the Court’s 38-week term.¹ This volume of cases submitted to the Court has risen dramatically over the last century. In 1900, the Court saw 406 cert petitions.² By 1950, that number grew to 1,195. By 1975, it

¹ *About the Supreme Court*, ADMIN. OFF. U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> (last visited Oct. 9, 2020).

² *Federal Judicial Caseloads, 1789–2016*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015> (last visited Oct. 11, 2020).

was nearly 4,000.³ Based on this trend, today's 7,000 cases could increase to as many as 20,000 by 2070.⁴ Even with the numbers as they are today, the Supreme Court "can review only a fraction of the lower federal and state court cases raising federal questions."⁵

However, the effective use of judicial maximalism by appellate courts may decrease these numbers. A maximalist judge can be described generally as answering the important questions and rendering broad enough decisions to provide guidance to lower courts and litigants regarding factually similar, though not identical, disputes. Minimalism, on the other hand, is a case-by-case approach that looks only to the specific set of facts before it and crafts a decision narrowly tailored to those unique facts.⁶ In some circumstances, a minimalist path-of-least-resistance may be necessary to avoid unintended consequences that may follow a broad decision. In other circumstances, this case-by-case approach leaves questions unanswered and provides more opportunity in the future for litigation on the same topic, thus burdening lower courts with more litigation and, in turn, laying the foundation for more disputes to reach the higher court's doors.⁷

The hypothesis proposed in this Note is as follows: Minimalism is appropriate, and even important, in some areas of the law; however, maximalism is the better approach when other actors outside of the judiciary rely on the judiciary's wisdom to carry out their work. For example, when police officers, health care providers, and other actors outside of the judiciary are involved, maximalism should be embraced. As such, this Note discusses the effects of judicial minimalism (or "minimalism") and maximalism over topics such as

³ See *id.*

⁴ This prediction is based on 50-year intervals starting at 406 cases in 1900, increasing to 1,195 cases in 1950, and a final statistic of approximately 7,000 cases in 2000. Aside from rounding the 7,852 cases filed in 2000 down to 7,000, this simple model does not take into account the recent decrease in the number of cert petitions filed after 2006. Therefore, the 20,000-case estimate is likely on the upper end of the realistic scale.

⁵ Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 4 (2009). Grove's solution is maximalism all the time: "The Court must therefore make the most of the cases it does hear by issuing broad (maximal) decisions that guide lower courts in the many cases that it lacks the capacity to review." *Id.* This Note's solution is maximalism in two particular contexts: (1) mini-maximalism, which is the use of maximalism after minimalism has run its course, and (2) when actors outside of the judiciary are involved.

⁶ See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME* ix–x (1999) [hereinafter *ONE CASE*]; see also Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1952 (2005).

⁷ Shallow decisions coming from the Court often leave issues undecided and give little to no underlying explanation for the decision itself. *ONE CASE*, *supra* note 6, at 17. Sunstein says the ultimate shallow decisions rest in the decision to deny certiorari. *Id.*

physician-assisted suicide and the new state challenges to *Roe v. Wade*.⁸ This Note shows, through an analysis of cases, that minimalism should only be a starting point. Eventually, a more definite and broadly applicable answer is necessary. The switch from minimalism to maximalism can and should occur when the court already has collected “data” from states and through other experimental means.

This Note also takes quick aim at analyzing the effects of the theory on lower courts and other actors. Maximalism is particularly more appropriate when actors outside of the judicial process are involved. For example, in its Fourth Amendment case law, the Supreme Court itself has recognized the importance of bright-line rules which guide law enforcement officers.⁹ There are many other factors that must be considered when a court makes a decision, and minimalism should only be leaned on when agreement is nearly impossible.

The purpose of this Note is not to argue for or against the validity of the theory of judicial minimalism, but instead, this Note assumes minimalism is a valid theory that appellate courts abide by before discussing the repercussions of those minimalist or maximalist choices. This Note accepts that minimalism may be appropriate for some areas of the law.¹⁰ However, courts cannot always hide behind the justification that they “should not decide issues unnecessary to the resolution of a case.”¹¹ For example, maximalist decisions are appropriate and necessary when “other actors” rely on the judiciary’s wisdom to carry out their work. *Roe v. Wade* is just one example. Legislatures, health care professionals, and women need clear guidance when it comes to abortion options.

This Note has both a descriptive and prescriptive component. Taking Sunstein’s theory of judicial minimalism as an accurate description of judicial behavior in Part II,¹² this Note then analyzes when courts should rely on maximalism in Part III.¹³ Additionally, Part III of this Note argues that maximalist decisions are a simple answer to the Court’s ever-growing caseload.¹⁴ This Note also applies this solution and asks whether, in light of the recent challenges to a seemingly maximalist opinion in *Roe v. Wade*, another maximalist decision is necessary to settle the field.¹⁵ This Note does *not* argue

⁸ 410 U.S. 113 (1973).

⁹ See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991).

¹⁰ Minimalism is appropriate when a Court is addressing an issue of first impression. See *infra* Part III.B. Sunstein suggests minimalism is also appropriate “when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds).” ONE CASE, *supra* note 6, at 5.

¹¹ *Id.* at 4.

¹² See *infra* Part II.

¹³ See *infra* Part III.

¹⁴ See *infra* Part III.

¹⁵ Yes, another maximalist decision may be necessary. See *infra* Section III.C.

that a maximalist decision intended to resolve a particular issue is meant to be treated as the court's final say on that subject. It only argues that taking a maximalist approach, when necessary, positively affects subsequent case law and lower courts.

II. BACKGROUND: DEFINING MINIMALISM

Judicial minimalism¹⁶ is a phrase unfamiliar to most new law students, yet most students could probably discuss the concept after completing just one semester. Most generally, a minimalist judge decides the case before her, as narrowly and shallowly as possible, and avoids “clear rules and final resolution.”¹⁷ Minimalists are the detail oriented, quiet observers in the back of the room, only speaking when necessary.¹⁸ Even when they do speak, they address as little as possible to only resolve the situation at hand.¹⁹

The art of saying just enough to justify an outcome, in theory, reduces the judicial decision-making burden and decreases the likelihood of judicial error.²⁰ Put simply, “minimalist decisions are fact-bound and undertheorized.”²¹ When a new, broad, or bright-line rule is necessary in a case, minimalists may attempt to “limit the impact of [the] rule by adopting a minimalist approach: defining the rule narrowly to encompass only the factual circumstances before

¹⁶ Professor Cass R. Sunstein, the Robert Walmsley University Professor at Harvard Law School, coined the phrase judicial minimalism and has written a book and many articles defining and describing the idea. *Biography: Cass R. Sunstein*, HARV. L. SCH., <https://hls.harvard.edu/faculty/directory/10871/Sunstein> (last visited Oct. 9, 2020). For some of his works, see ONE CASE, *supra* note 6 and Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008) [hereinafter *Beyond Minimalism*]. But see Grove, *supra* note 5, at 10 (“I also want to underscore that the distinction between minimalism and vertical maximalism is a matter of degree and not of kind. *Neither approach to opinion writing can easily be reduced to precise definition*. Instead, both constitute general approaches to decision making.”) (emphasis added).

¹⁷ ONE CASE, *supra* note 6, at ix; see also Grove, *supra* note 5, at 6 (“Minimalist opinions are both narrow, in that they resolve only the case at hand, and shallow, in that they decline to offer a broad theoretical justification for that holding.”) (internal quotations omitted) (internal citations omitted).

¹⁸ See Siegel, *supra* note 6, at 1954 (“Minimalists ‘say no more than necessary,’ Professor Sunstein urges, ‘resolv[ing] the largest issues of the day . . . as narrowly as possible,’ and requiring ‘[a]bove all . . . procedures that are lawful, proper and fair.’”) (quoting Cass R. Sunstein, Op-Ed, *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004 (§ 4), at 9).

¹⁹ ONE CASE, *supra* note 6, at ix–x (“A minimalist court settles the case before it, but it leaves many things undecided It seeks to decide cases on narrow grounds.”).

²⁰ *Id.* at 4.

²¹ Grove, *supra* note 5, at 6.

[them].”²² When this occurs, “it leaves other courts in other cases free to make their own rules of law.”²³

A minimalist court can be defined as follows:

It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values. To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments.²⁴

In short, “[m]inimalists counsel courts to a course of patience, moderation, and compromise on contentious issues.”²⁵ The most distinctive feature of a minimalist is her preference for leaving “fundamental issues undecided.”²⁶ To clarify the extent of Sunstein’s argument, he suggests that “decisions are not usually minimalist or not; they are minimalist *along certain dimensions*.”²⁷

The simplest example of minimalism in the Supreme Court is the denial of certiorari without comment.²⁸ This act is an assertion—a judgment from the Court—without an opinion. The assertion is as narrow as it can be. Dissenting from the denial of certiorari indicates a maximalist Justice.²⁹ Dissenting is unnecessary, as it is only dicta, and provides an opinion when one is not required. This simple example exemplifies the differences between minimalists and maximalists.³⁰

²² *Id.* at 3.

²³ *Id.*

²⁴ Siegel, *supra* note 6, at 1954 (quoting ONE CASE, *supra* note 6, at ix–x).

²⁵ Tara Smith, *Reckless Causation: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 349 (2010).

²⁶ ONE CASE, *supra* note 6, at x.

²⁷ *Id.* at 19.

²⁸ Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL’Y 1045, 1070–71 (2009).

²⁹ *Id.* at 1071.

³⁰ *Id.*

It is worth noting that justices that disagree doctrinally can be on the same side of the minimalist/maximalist divide.³¹ This means that minimalism affects the *opinion* in a case and not the *judgment*.³² Judgments “are the dispositions in the individual cases before the Court,” while opinions are the underlying justification and reasoning for a judgment with an eye on the future.³³ It is opinions, and not judgments, that can be affected by minimalism or maximalism.³⁴ Minimalists are concerned with the scope of an opinion.³⁵ Minimalists seek “narrowness and shallowness”³⁶ in an opinion, to reduce the subsequent applicability of its determination to a later case.³⁷

Judicial minimalism is not a perfect theory. It is certainly more appropriate in some cases than in others. Sunstein has outlined five factors that indicate when minimalism may succeed, and four factors which indicate that maximalism may be more appropriate. *Washington v. Glucksberg*³⁸ exemplifies the effective use of minimalism.

³¹ See *id.* at 1076. Justices can be minimalists or maximalists. *Id.* at 1053. Anderson distinguishes between minimalism in a constitutional and non-constitutional context. See *id.* at 1067–68. However, these classifications are not permanent, at times varying based on the type of case, whether constitutional or non-constitutional, before them. *Id.* at 1068. Anderson argues that in non-constitutional cases, “[t]he difference between judgments and opinions is much smaller.” *Id.* at 1088.

The attraction of minimalism to a wide range of justices “seemingly offers the exact kind of neutrality that adjudication should offer.” Smith, *supra* note 25, at 350. However, this may also indicate that “something is amiss.” *Id.* at 350 (arguing that minimalism is so broad “that the core idea of Minimalism is completely untenable”). Minimalism has not gone without criticism. See, e.g., SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION (2007); Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297 (2001); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207 (2006).

³² *Id.* at 1055 (demonstrating how Anderson distinguishes between minimalist judges outputting “judgments” and “opinions”).

³³ *Id.*

³⁴ *Id.*

³⁵ See Anderson, *supra* note 28, at 1075.

³⁶ ONE CASE, *supra* note 6, at 10.

³⁷ The author pauses for a moment to note that a similar theory to the theory of judicial minimalism, an analysis of rules versus standards, may produce the same effects on lower courts. For a discussion on the rules versus standards theory, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992). For a discussion on how that theory may affect judicial minimalism, see Anderson, *supra* note 28, at 1083 (2009) (suggesting that the rules-standards analysis is perhaps just a “special case” of the minimalism-maximalism analysis). A justice’s preferences for rules versus standards may affect the scope of an opinion similarly to how a minimalist justice would decide scope. Even Sunstein noted the similarity. See ONE CASE, *supra* note 6, at 41–42.

³⁸ 521 U.S. 702 (1997).

A. *Why Judicial Minimalism Makes Sense*

So, that's *what* judicial minimalism is, but *why* should appellate courts care? Sunstein proffers four reasons why judicial minimalism is needed.³⁹ First, minimalism is helpful because it welcomes agreement when the Court cannot reach a consensus.⁴⁰ This leads to a "shallow" opinion in the sense that the Court does "not give a deep theoretical grounding" but nonetheless allows the Court to issue a decision without the judges coming to an agreement.⁴¹ Therefore, unanimous decisions are often minimalist⁴² because they provide a judgment without a helpful opinion. These opinions are often led by phrasing such as "based on the facts of this case" or "in only a small number of cases," indicating that the Court's opinion should not be applied to even slightly dissimilar cases in the future.

Second, minimalism can be used because the Court lacks relevant information.⁴³ Third, and perhaps most importantly for minimalist justices concerned with making the right judgment for this case and later cases, minimalism is appropriate when the Court is unsure of the implications tied to deciding the case one way or the other.⁴⁴

Fourth, which is affected by the third factor, the Court may engage in minimalism because it in good faith believes that democracy is more suited to decide the issue.⁴⁵ This minimalist idea allows other branches of government as well as the American people to engage in "democratic deliberation," which can allow other means of resolution or context for future cases.⁴⁶ Lastly, the Court may choose minimalism if a clear rule or wide, deep ruling has the potential to "face intense political opposition."⁴⁷ Despite Alexander Hamilton's labeling of the Supreme Court as the weakest branch, the Supreme Court actually "exercise[s] an extraordinary degree of authority over our society and culture."⁴⁸ Thus, extending what Sunstein suggests, deciding a case using a maximalist

³⁹ ONE CASE, *supra* note 6, at 53–54.

⁴⁰ *Id.* at 53. See generally Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

⁴¹ ONE CASE, *supra* note 6, at 18.

⁴² Anderson, *supra* note 28, at 1072.

⁴³ ONE CASE, *supra* note 6, at 53.

⁴⁴ *Id.* at 53–54.

⁴⁵ *Id.* at 54.

⁴⁶ See *id.* at 54–55.

⁴⁷ *Id.* at 54.

⁴⁸ Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 787 (1999).

approach, rather than a minimalist one, without the support of the people could have adverse effects on the perception of the court's legitimacy.⁴⁹

Now that the *reasons behind* minimalism have been outlined, it is important to understand *situations* which indicate to the justices when minimalism should be used, according to Sunstein. There are four delineated situations in which the Court might engage in judicial minimalism effectively:

Minimalism becomes more attractive (1) when judges are proceeding in the midst of (constitutionally relevant) factual or moral uncertainty and rapidly changing circumstances, (2) when any solution seems likely to be confounded by future case, (3) when the need for advance planning does not seem insistent, and (4) when the preconditions for democratic self-government are not at stake and democratic goals are likely to be promoted by a rule-bound judgment.⁵⁰

In general, the more complex an issue is and the more people who feel deeply about a divisive issue, the more likely minimalism will be an effective path for judges to take.⁵¹ Additionally, the states are important actors in the political system, and minimalism allows room for their deliberation in the democratic process.⁵²

B. *A Minimalist Decision in Effect*

One instance that illustrates the effect of minimalist decision making is when the Supreme Court was presented the question of whether it should recognize education as a fundamental right. *San Antonio Independent School District v. Rodriguez*⁵³ is a minimalist decision because it was democracy-promoting⁵⁴ and left room for other actors outside of the judiciary to do the work.

Rodriguez was an equal protection case decided after *Brown v. Board of Education*,⁵⁵ but this time the Court declined to recognize a fundamental right to education under the Fourteenth Amendment.⁵⁶ The Court was asked to decide if

⁴⁹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); ONE CASE, *supra* note 6, at 59. Though, I do agree with Sunstein that “[u]sually it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which all or most agree.” *Beyond Minimalism*, *supra* note 16, at 841.

⁵⁰ ONE CASE, *supra* note 6, at 57.

⁵¹ *Id.* at 5.

⁵² See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS (2018).

⁵³ 411 U.S. 1 (1973).

⁵⁴ See ONE CASE, *supra* note 6, at 24–25.

⁵⁵ 349 U.S. 294 (1955).

⁵⁶ *Rodriguez*, 411 U.S. at 35.

education was protected under the Constitution.⁵⁷ At the time of this case, there was such a disparity between the income of schools that the states sought to solve the problem themselves, perhaps in light of *Brown*.⁵⁸ The disparity among the funding for several Texas schools was often related to race and was heightened because “the greatest educational needs received the worst (or at least the lowest-funded) education.”⁵⁹ The plaintiffs sought to require a more uniform funding system in the state of Texas under the Equal Protection Clause.⁶⁰

The Court in *Rodriguez* could have either decided the case under strict scrutiny or rational basis.⁶¹ Not surprisingly, the Court chose rational basis, the minimalist choice.⁶² This allowed the Court to defer to the State if the funding policy was rationally related to a legitimate state purpose.⁶³

While the Federal Government allowed such a minimalist answer, many states took action on their own to mitigate the problem.⁶⁴ *Rodriguez* was different from other minimalist decisions because the Court chose to allow other routes of democracy to take flight rather than to take over itself.⁶⁵ Before *Rodriguez* was decided even at the district court, the Texas Legislature unsuccessfully attempted for two years to reform funding legislation to lessen the problem.⁶⁶ After *Rodriguez*, states were left on their own to create a system that would promote equity in school funding regimes.⁶⁷

⁵⁷ *Id.* at 33.

⁵⁸ *See* SUTTON, *supra* note 52, at 22–23.

⁵⁹ *Id.* at 23.

⁶⁰ *See id.* at 22–23. *But see Rodriguez*, 411 U.S. at 57 (finding no more than a random probability that racial minorities were concentrated in lower funded districts).

⁶¹ SUTTON, *supra* note 52, at 24.

⁶² ONE CASE, *supra* note 6, at 26 (“Cautious judges can promote democratic deliberation with more minimalist strategies, designed to bracket some of the deeper questions but also to ensure both accountability and reflection. Many minimalist decisions attempt to ensure more in the way of democracy and more in the way of deliberation.”). As Sutton puts it, “*Rodriguez* tolerated the continuation of a funding system that allowed serious disparities in the quality of the education children received based solely on the wealth of the community in which their parents happened to live or could afford to live.” SUTTON, *supra* note 52, at 27.

⁶³ *Rodriguez*, 411 U.S. at 40.

⁶⁴ *See id.*

⁶⁵ *See* ONE CASE, *supra* note 6, at 27 (“[S]ome decisions are democracy-promoting because they try to trigger or improve processes of democratic deliberation. Minimalist courts can provide spurs and prods to promote democratic deliberation itself.”).

⁶⁶ SUTTON, *supra* note 52, at 25.

⁶⁷ *Id.* at 3.

In analyzing the unique situation after *Rodriguez*, it is important to note that states have the power to create systems of public schools.⁶⁸ This power allowed them to draft around or provide further protection for education.⁶⁹ Additionally, the legislatures were a larger part of the post-*Rodriguez* movement than were the lower courts.⁷⁰ The legislatures experimented with fairer funding systems for longer than what would have been necessary if the *Rodriguez* Court had issued a maximalist decision outlining what was required under the Equal Protection Clause for fair funding.

Rodriguez showcases the increased workload among lower governmental entities caused by a minimalist decision. While the state legislatures were doing more work as a result of *Rodriguez*, the lower courts also kept busy.⁷¹ These lower level lawsuits focused on the Equal Protection Clause but also addressed alleged violations of state constitutions.⁷² As Sixth Circuit Judge and author Jeffery Sutton quantifies it, “roughly forty-five States by now have faced state-constitutional challenges to their system of funding public schools.”⁷³ These cases and legislative enactments were largely due to the Court’s minimalist decision in *Rodriguez*, which forced the states to take action.

C. When Minimalism Does Not Make Sense

Sometimes, minimalism is not the means to the end, but maximalism may be. So, how is a maximalist different from a minimalist? Maximalists seek to publish opinions that will create strong precedent so judges sitting in lower courts or on subsequent cases have a guidepost.⁷⁴ As a result of this, maximalists tend to have a stronger adherence to *stare decisis* and more easily allow a previous decision to encompass the case at hand.⁷⁵ This is contrasted to minimalists who seem to have a keen eye for dicta, which may lead to decisions on a case-by-case basis.⁷⁶ In some circumstances, maximalism is a more suitable approach for an appellate court:

[I]t is worthwhile to attempt a *broad* and *deep* solution (1) when judges have considerable confidence in the merits of that

⁶⁸ In looking at early state constitutions, “many States amended their constitutions, requiring the legislature . . . to create a ‘thorough and efficient’ system of public schools.” *Id.* at 27.

⁶⁹ *See id.* at 29.

⁷⁰ *See id.* at 37.

⁷¹ *See id.* at 30.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *See id.* at 20.

⁷⁶ *See id.*

solution, (2) when the solution can reduce costly uncertainty for future courts and litigants, (3) when advance planning is important, and (4) when a maximalist approach will promote democratic goals either by creating the preconditions for democracy or by imposing good incentives on elected officials, incentives to which they are likely to be responsive.⁷⁷

A similar theory to the one presented in this Note is “vertical maximalism,” which encourages the Supreme Court to recognize its power and use it often.⁷⁸ Under vertical maximalism, higher courts have a duty to issue rules that govern lower courts.⁷⁹ The theory rests on the current structure of the judicial system and how to best preserve the Supreme Court’s “supreme role.”⁸⁰ The judicial system is a hierarchy under Article III of the Constitution and the Supremacy Clause.⁸¹ The higher up in the hierarchy, the more important broad decisions become.⁸² But, it has not always been this way.⁸³

Initially, the Supreme Court “had the capacity to hear every appeal properly brought before it.”⁸⁴ However, with each court’s increasing case load, this is not the case today.⁸⁵ The role of an appellate court in a system of vertical maximalism is to “issue[] broad decisions that govern a wide range of cases in the lower courts.”⁸⁶ As this approach indicates, vertical maximalism is not a substitute for the democratic process.⁸⁷ Instead, even maximalist courts can “defer to the political branches.”⁸⁸ This allows the Supreme Court to maintain its role as a guide while maintaining the legitimacy of the democratic process.⁸⁹

⁷⁷ ONE CASE, *supra* note 6, at 57 (emphasis added).

⁷⁸ Grove, *supra* note 5, at 3.

⁷⁹ *Id.*

⁸⁰ *Id.* at 4 (quotations omitted).

⁸¹ *Id.* at 3.

⁸² *Id.*

⁸³ *Id.* at 4.

⁸⁴ *Id.*

⁸⁵ *See supra* Part I.

⁸⁶ Grove, *supra* note 5, at 3.

⁸⁷ *Id.* (“The Court may, under the approach offered here, issue rulings that require all lower courts to defer to the political branches (such as when it concludes that economic regulations are subject to rational basis scrutiny or that courts must defer to an agency’s reasonable construction of an ambiguous statute).”) (footnotes omitted).

⁸⁸ *Id.* at 1.

⁸⁹ *See id.* at 4.

1. Successful Maximalist Decisions

The best maximalist case to date, according to Sunstein,⁹⁰ comes from the Warren Court: *Brown v. Board of Education*.⁹¹ Although known as a landmark case for desegregation, *Brown* was not the first decision by the Court addressing the issue. Rather, there were ample historical cases that sufficiently lead up to *Brown*; “There were premonitory tremors and quakes, indicating that a major legal quake was impending.”⁹²

*Plessy v. Ferguson*⁹³ was the first attempt by the Court to address the issue. The Court upheld a separate but equal standard, an arguably maximalist decision.⁹⁴ But even at the time *Plessy* was decided, Justice John M. Harlan warned the Court of its mistake: “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.”⁹⁵ *Plessy* was not supported by historical context, so it failed.⁹⁶ Following *Plessy* and leading up to *Brown* were a series of four minimalist decisions,⁹⁷ each leaning further away from *Plessy* and setting the stage nicely for *Brown*.⁹⁸ These four cases rested in the separate-but-equal context but began to dissolve racial separation.⁹⁹

⁹⁰ ONE CASE, *supra* note 6, at xiii.

⁹¹ 347 U.S. 483 (1954).

⁹² Benjamin H. Kizer, *The Impact of Brown v. Board of Education*, 2 GONZ. L. REV. 1, 1 (1967).

⁹³ 163 U.S. 537 (1896).

⁹⁴ By upholding the separate but equal doctrine, the Court espoused a rule of broad application for all other lower courts to follow. This typifies the maximalist approach.

⁹⁵ *Id.* at 559 (Harlan, J., dissenting).

⁹⁶ Chris Edelson, *Judging in a Vacuum, or, Once More, Without Feeling: How Justice Scalia’s Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson*, 45 AKRON L. REV. 513, 520 (2012) (“*Plessy* suffered from its refus[al] to confront the social meaning of segregation and its harm to black Americans. . . . In other words, the *Plessy* Court failed to take relevant social and historical context into account.”) (internal quotation marks and citation omitted).

⁹⁷ Motley identifies four pre-*Brown* cases, which she calls “foundations rulings”: *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948), *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), and *Sweatt v. Painter*, 339 U.S. 629 (1950). Hon. Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court’s Decision*, 61 FORDHAM L. REV. 9, 9 (1992). This note identifies these cases as minimalist because the courts only decided the case before it, and the cases had weak precedential values.

⁹⁸ Motley, *supra* note 97.

⁹⁹ See, e.g., *McLaurin*, 339 U.S. at 642 (“We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race.”).

Fifty-eight years after *Plessy*, the historical context had matured¹⁰⁰ with the help of these minimalist decisions, and *Brown* was rightfully decided. In fact, just four years after *Brown* was decided, it was reaffirmed in *Cooper v. Aaron*.¹⁰¹ As Siegel described *Brown* and the case's historical context, "the Justices step[ped] up and forcefully expound[ed] the fundamental law regardless of how polarizing [the] issue may be."¹⁰² Because the Court boldly and broadly decided *Brown* as it did, *Brown* is a maximalist decision.

Brown was certainly followed by what Kizer calls "minor legal quakes,"¹⁰³ including *Brown II*.¹⁰⁴ Over 2,500 cases have cited *Brown* since the Court decided the case in 1954.¹⁰⁵ Thirty-one of those cases have received negative treatment,¹⁰⁶ that is approximately 1%. However, *Brown* is now accepted as among the most followed Supreme Court decisions to date.

2. Failed Maximalist Decisions

In the context of deciding if a rule or a standard is more appropriate, Professor Louis Kaplow determined that "whether a lower decision will constitute a precedent affects the degree of effort an adjudicator should expend in giving content to a standard."¹⁰⁷ Taking this idea and applying it to the minimalist argument, a factor in determining if minimalism is appropriate is the ease of acceptance among lower courts and litigants. If a maximalist decision is likely to be followed, then a maximalist approach should be taken. This seems circular in a sense, but consider cases in the Supreme Court's history where maximalism was not appropriate, yet was used, and the result was not favorable. Two prime examples of the limits of maximalism are *Dred Scott v. Sanford*¹⁰⁸ and *Lochner v. New York*.¹⁰⁹

¹⁰⁰ Motley, *supra* note 97 (discussing World War II as a "necessary predicate to ending racial segregation by state governments").

¹⁰¹ 358 U.S. 1 (1958).

¹⁰² Siegel, *supra* note 6, at 1953.

¹⁰³ Kizer, *supra* note 92, at 1 (internal quotations omitted).

¹⁰⁴ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

¹⁰⁵ According to Westlaw's Citing References.

¹⁰⁶ According to Westlaw's Negative Treatment.

¹⁰⁷ Kaplow, *supra* note 37, at 583.

¹⁰⁸ 60 U.S. 393 (1857).

¹⁰⁹ 198 U.S. 45 (1905).

The *Dred Scott* decision is notoriously one of the worst in the history of the Supreme Court.¹¹⁰ The 1875 decision denied Scott citizenship and access to the courts because of his “African descent.”¹¹¹ The Court went on, deciding more than arguably necessary, to hold that the Missouri Compromise was unconstitutional.¹¹²

Dred Scott was decided in the years leading up to the Civil War. Actors in the historical context of *Scott* did not agree. The majority of the Court was compromised of five southern justices.¹¹³ Unfortunately, these justices were on the losing side of history. Hagan argues that two letters effected the outcome of the *Dred Scott* case.¹¹⁴ These letters revealed that the President-elect, James Buchanan, and the Court had discussed the concerns that *Dred Scott* would soon raise.¹¹⁵ The first letter, written from an agent of the Court to Buchanan directly, informed Buchanan that the case was going to be decisive one way or the other.¹¹⁶

Additional letters, coming from both Southerners and Northerners, shed light on the anxious nature of the people to address this question. In that sense, the issue was ready to be decided.¹¹⁷ However, not enough actors in the historical context agreed upon what the outcome should be. Because the Court was urged to make a decision, it did so at an inappropriate time. The Court should have maintained its original view¹¹⁸ and avoided deciding the validity of the Missouri Compromise. The use of maximalism in *Scott* was so destructive as to require a constitutional amendment to undo it.¹¹⁹

Lochner is also considered by some to be on the same shameful page of the Court’s history as *Scott*.¹²⁰ Pre-*Lochner*, and even for some time after, there was “a great outpouring of regulatory legislation by the states and, early on to a lesser extent, the federal government.”¹²¹ States at the time regulated many areas of the economy including “health and safety standards and inspections for

¹¹⁰ See, e.g., Horace H. Hagan, *The Dred Scott Decision*, 15 GEO. L.J. 95, 95 (1927); see also Jack M. Blakin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 54 (2007).

¹¹¹ *Scott*, 60 U.S. at 397.

¹¹² *Id.* at 455.

¹¹³ Hagan, *supra* note 110, at 96.

¹¹⁴ *Id.* at 95.

¹¹⁵ *Id.* at 96.

¹¹⁶ *Id.* at 96–97.

¹¹⁷ See, e.g., *id.* at 98.

¹¹⁸ *Id.* at 96.

¹¹⁹ U.S. CONST. amend. XIV.

¹²⁰ See, e.g., Ellen Frankel Paul, *Freedom of Contract and the “Political Economy” of Lochner v. New York*, 1 N.Y.U. J.L. & LIBERTY 515, 516 (2005).

¹²¹ *Id.* at 517 (internal citations omitted).

factories and mines, railroad safety regulations and rate fixing, maximum hours laws, minimum wage laws, limit on child labor, price fixing for goods and services, prohibitions on the production of alcoholic beverages, banking and insurance regulation,” and many more aspects of daily life in the workforce.¹²² Regulatory legislation was far from new when *Lochner* was decided in 1905.¹²³ In 1904, Ernst Freund, an author of treatises often favoring state regulation, described the environment as a time of expansion, with state government having more “incisive powers” than ever before.¹²⁴

Lochner, however, does not reflect this expansion. The Court in *Lochner* restricted state governments from regulating working hours and supported freedom of contract for workers and employers.¹²⁵ The Court rejected the New York statute as an invalid exercise of police power,¹²⁶ despite the apparent expansion of state regulatory power.¹²⁷ Justice Holmes in his dissent even pointed out that “[t]his case is decided upon an economic theory which a large part of the country does not entertain.”¹²⁸ Less than 30 years after *Lochner*, the Court shifted from its failed maximalist decision in *Nebbia v. New York*.¹²⁹ The Court this time upheld state price regulations based on economic policies.¹³⁰ *Nebbia* was not quite the maximalist decision to steer all subsequent state regulatory cases, but it marked a shift in Supreme Court precedent more toward the leanings of the public and legislators at the time. The Court subsequently upheld a regulatory law in *West Coast Hotel v. Parrish*¹³¹ and upheld a similar law in *United States v. Carolene Products*,¹³² solidifying the shift away from *Lochner*.

The ultimate maximalist decision in the area of substantive due process and economic liberties is *Williamson v. Lee Optical*.¹³³ The *Williamson*

¹²² *Id.* at 518.

¹²³ *Id.*

¹²⁴ *Id.* (“Ernst Freund, a treatise writer not unfriendly to economic regulation under the states’ police power, stated: ‘A vast amount of police legislation is justified on this ground, and the state is readily conceded more incisive powers than despotic governments would have dared to claim in former times.’”) (citing ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 109 (1904)).

¹²⁵ *Lochner v. New York*, 198 U.S. 45, 60 (1905).

¹²⁶ *Id.* at 61.

¹²⁷ Paul, *supra* note 120, at 518.

¹²⁸ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

¹²⁹ 291 U.S. 502 (1934).

¹³⁰ *Id.* at 537.

¹³¹ 300 U.S. 379 (1937).

¹³² 304 U.S. 144 (1938).

¹³³ 348 U.S. 483 (1955).

“conceivable rational relationship” test,¹³⁴ though not a strict test, governs lower courts in the area of substantive due process and provides a framework for which subsequent litigation can be assessed and decided in an efficient and hopefully uniform manner. Under the fourth factor, which Sunstein identifies as an appropriate situation to use minimalism, the case is only minimalist because it leaves room for other actors in the democracy. Otherwise, *Williamson* acts as a maximalist decision and allows lower courts to apply a clear rule to a range of situations.

III. ANALYSIS: EFFECTIVE USE OF MAXIMALISM

This Note does not advocate for courts to embrace maximalism all of the time like Tara Leigh Grove does in her call to action theory—“vertical maximalism.” However, maximalism is becoming more necessary to guide lower courts through their increasing case load.¹³⁵ First, we must understand the differing effects of minimalism and maximalism on subsequent case law. When the Supreme Court issues a minimalist decision, it “leaves a great deal undecided, in a way that frees up future decision-makers but also leaves them to some extent at sea.”¹³⁶ This is more mud than crystal;¹³⁷ does a minimalist decision create more or less work for lower courts? Does it increase or decrease the amount of subsequent case law on the subject? These answers are explored below and the following conclusion is reached: maximalism is necessary in two situations. First, appellate courts should issue maximalism decisions when an area of the law would benefit from a uniform approach and minimalism has previously been employed in the area. Second, maximalism is appropriate when there is a need to look to and rely on guidance from the judiciary.

Put simply, minimalists have an appreciation—and possibly a fear—of the “potentially harmful effects of decisions that reach far beyond the case at hand.”¹³⁸ On the other hand, maximalists are more confident that deciding a case based on deeper ground can be the correct and just way to proceed, both now and

¹³⁴ See *id.* at 491.

¹³⁵ See *supra* Part I.

¹³⁶ *Beyond Minimalism*, *supra* note 16, at 838; see also Grove, *supra* note 5, at 4 (“When the current Court instead issues a narrow, fact-bound (minimalist) decision, it leaves a great deal to be decided by the lower courts in future cases and thereby delegates its supreme law-declaration function to its judicial inferiors.”).

¹³⁷ This idea, that “hard-edged rules” are like crystals and “ambiguous rules of decision” are more like mud, comes from a law review article concerning property law but seems applicable in this context also. See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

¹³⁸ *Beyond Minimalism*, *supra* note 16, at 827.

in the future.¹³⁹ Sunstein puts it this way: “as judicial confidence grows, perhaps because of extended experience, the argument for depth grows as well.”¹⁴⁰

This Note comes to the conclusion that minimalist decisions create more work for lower courts and increase the need for subsequent case law. Eventually, a maximalist decision is warranted if other actors rely on the clear rules from the judiciary, even if that decision does not stand for centuries to come. Maximalist decisions are necessary to resolve subsequent legal questions in an efficient manner, especially when “other actors” are involved in the carrying out of a maximalist decision.¹⁴¹ The laws of the United States do not allow indefiniteness in criminal statutes,¹⁴² so why should the rules be any different when *interpreting* statutes and *applying* the law?

A. *Maximalism Is Appropriate When Other Actors Are Implicated*

Maximalism is a tool the judiciary can use to more effectively give power to its opinions and orders. The judiciary is not the weakest branch of the government.¹⁴³ Therefore, it should not be afraid to give guidance to those seeking it. For example, police officers rely on Fourth Amendment case law during their day-to-day activities; similarly, abortion clinicians and others in the medical field rely on decisions of the judiciary. In cases that implicate other actors, the Court must take a maximalist approach and decree a clear rule which acts as a final resolution to maintain and increase its legitimacy.

Minimalism causes indefinite rules of law. Without guiding principles, lower courts and other actors relying on clear rules are left to their own devices. It is unconstitutional in the criminal context for legislatures to enact indefinite criminal statutes.¹⁴⁴ Though this has been interpreted loosely,¹⁴⁵ why are we

¹³⁹ See *id.* at 840.

¹⁴⁰ *Id.*

¹⁴¹ See *infra* Section III.A.

¹⁴² *United States v. Harriss*, 347 U.S. 612, 617 (1954) (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”).

¹⁴³ See THE FEDERALIST NO. 78 (Alexander Hamilton) for a contrary analysis.

¹⁴⁴ *Harriss*, 347 U.S. at 617 (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”).

¹⁴⁵ See, e.g., *Wainwright v. Stone*, 414 U.S. 21 (1973); see also Robert E. Riggs, *Miller v. California Revisited: An Empirical Note*, 1981 BYU L. REV. 247, 257 (1981) (“In cases decided by the Supreme Court there is no dissent from the proposition that some degree of uncertainty is constitutionally tolerable.”).

encouraging courts to act minimalistically?¹⁴⁶ As previously discussed, minimalism is appropriately applied in some contexts. However, maximalism should be encouraged when other actors are frequently applying precedent and when minimalism has run its course.

Three cases exemplify the importance of going beyond case-by-case decision making and embracing maximalism when necessary: *Miller v. California*,¹⁴⁷ *California v. Acevedo*,¹⁴⁸ and *Roe v. Wade*.¹⁴⁹ In all three contexts, maximalism was intended to settle the law and prevent “endless litigation”¹⁵⁰ in these areas. The first two cases provide grounds for the effective use of maximalism through their effect on actors outside of the judiciary. In the third case, though outside actors are certainly implicated, the grounds for using maximalism lies in the mini-maximalism reasoning. Timing is what is important for a maximalist decision that may be needed to settle *Roe*.

1. Obscenity Law

Movie makers, magazine publishers, artists, and store owners—among others—are affected by the judiciary’s decisions in this area of the law. Before the *Miller* decision, the Court thought it nearly impossible to create a workable constitutional standard for obscene materials.¹⁵¹ In 1873, newly enacted obscenity laws banned “obscene, lewd, lascivious, or filthy”¹⁵² materials, “but it

¹⁴⁶ See Grove, *supra* note 5, at 1 (“Many prominent jurists and scholars, including those with outlooks as diverse as Chief Justice John Roberts and Cass Sunstein, have recently advocated a “minimalist” approach to opinion writing at the Supreme Court.”).

¹⁴⁷ 413 U.S. 15 (1973).

¹⁴⁸ 500 U.S. 565 (1991).

¹⁴⁹ 410 U.S. 113 (1973).

¹⁵⁰ *Payton v. New York*, 445 U.S. 573, 620 (1980) (White, J., dissenting) (quoting *United States v. Watson*, 423 U.S. 411, 423 (1976)).

¹⁵¹ Riggs, *supra* note 145, at 247. For a full history of obscenity law in American history, see Geoffrey R. Stone, *Sex and the First Amendment: The Long and Winding History of Obscenity Law*, 17 FIRST AMEND. L. REV. 134 (2019). Specifically, Justice Brennan expressed his disbelief in his dissent in *Paris Adult Theatre I v. Slaton*: “no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment.” 413 U.S. 49, 83–85 (1973) (Brennan, J., dissenting) (footnote omitted). Brennan made this statement *after* writing his majority opinion in *Roth v. United States*, 354 U.S. 476 (1957). Before *Roth*, courts relied on old English obscenity case law. Riggs, *supra* note 145, at 248.

¹⁵² Comstock Act, ch. 258, 17 Stat. 598 (1873).

did not define those terms.”¹⁵³ In 1913, the standard changed, defining “obscene” materials in the eye of the law to mean “the present critical point in the compromise between candor and shame at which the community may have arrived here and now.”¹⁵⁴ But this definition was not universal and states began to experiment to come up with a “coherent meaning” for the “legal concept of ‘obscenity.’”¹⁵⁵

When the Supreme Court addressed the issue in 1957 in its decision in *Roth v. United States*,¹⁵⁶ it held that obscene materials were not protected under the First Amendment.¹⁵⁷ It did, in a maximalist fashion, set forth another standard for determining what materials were legally considered “obscene”: the government can censor such materials “only if the material, judged as a whole, appeals primarily to the prurient interest in sex, is patently offensive to contemporary community standards, and lacks any redeeming social value.”¹⁵⁸ *Roth* changed the direction of obscenity case law.¹⁵⁹ But even this approach was not satisfactory;¹⁶⁰ “The Court’s inability to articulate a clear definition of obscenity led to an era of chaos and confusion.”¹⁶¹ Justice Stewart’s famous phrase for determining if material is obscene describes the lack of direction well: “That’s it, that’s it. I know it when I see it.”¹⁶²

¹⁵³ Stone, *supra* note 151, at 137. During this time, “[m]aterial was deemed obscene if it had even the potential to corrupt an impressionable adolescent.” *Id.* Enforcement boiled down to this: “Any reference to sex in this era was unlawful.” *Id.* at 138.

¹⁵⁴ *Id.* at 138 (citing *United States v. Kennerly*, 209 F. 119, 121 (S.D.N.Y. 1913)).

¹⁵⁵ *Id.* For example, “the Supreme Judicial Court of Massachusetts held that Theodore Dreiser’s acclaimed masterpiece *An American Tragedy* was obscene because it included a scene in which the main character visits a house of prostitution and another in which the main character and his pregnant girlfriend attempt to secure an abortion.” *Id.* at 138–39 (citing *Commonwealth v. Friede*, 171 N.E. 472 (Mass. 1930)).

¹⁵⁶ 354 U.S. 476 (1957).

¹⁵⁷ Stone, *supra* note 151, at 139 (citing *Roth*, 354 U.S. 476 (1957)).

¹⁵⁸ *Id.*

¹⁵⁹ “*Roth* replaced the standard of the most susceptible members of a potential audience with the standard of the ‘average person, applying contemporary community stands.’” Riggs, *supra* note 145, at 249 (quoting *Roth*, 354 U.S. at 489).

¹⁶⁰ See *id.* at 250 (“No one regarded this doctrinal anarchy as a satisfactory state of affairs, and it was ultimately terminated by *Miller v. California* . . .” (internal citation omitted)).

¹⁶¹ Stone, *supra* note 151, at 140.

¹⁶² *Id.* at 140 (citing BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 239 (1979)); see also *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .”).

This era of confusion and lack of guidance ended with Chief Justice Burger's appointment to the Court.¹⁶³ In 1973, the Court in *Miller*¹⁶⁴ issued new guidance to determine what constituted obscene materials.¹⁶⁵ This new test, the "utterly without redeeming social value test,"¹⁶⁶ allowed materials to be legally obscene if a court concluded the following:

the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; that the work depicts or describes sexual conduct in a patently offensive manner; and that the work, taken as a whole, lack "serious literary, artistic, political or scientific value."¹⁶⁷

Though obscenity is a rarely litigated issue today,¹⁶⁸ *Miller* was the maximalist decision that settled the law in this area. *Miller*, through its five Justice majority, "pointed to the need for agreement on a more specific and concrete definition" in the area of obscenity law.¹⁶⁹ At this point, minimalism and the strategy of determining obscene materials had run its course. Minimalism was no longer allowing states to address the problem efficiently. The use of maximalism in issuing the *Miller* social value test appropriately defined obscenity for other actors to sufficiently follow precedent. The Court explicitly pointed out this intentional issuance of a broad rule. According to the Court in *Paris Adult Theatre I v. Slaton*,¹⁷⁰ *Miller* "sought to clarify the constitutional definition of obscene material subject to regulation by the States."¹⁷¹ The

¹⁶³ See Stone, *supra* note 151, at 141.

¹⁶⁴ *Miller*'s companion case was *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

¹⁶⁵ Riggs, *supra* note 145, at 250. The new guideline set forth in *Miller* is as follows:
(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

¹⁶⁶ Stone, *supra* note 151, at 142.

¹⁶⁷ *Id.* (quoting *Miller*, 413 U.S. at 24) (emphasis added).

¹⁶⁸ "[T]he Department of Justice filed fewer than ten adult obscenity prosecutions between 2001 and 2005." *Id.* at 142–43. "By the early years of [the] twenty-first century, . . . we had for all practical purposes reached the end of obscenity." *Id.* at 143.

¹⁶⁹ Riggs, *supra* note 145, at 250.

¹⁷⁰ 413 U.S. 49, 55 (1973).

¹⁷¹ *Id.*

surprising, and perhaps unintended,¹⁷² flexibility of this delineated rule allowed *Miller* to stand through shifting societal and cultural values.¹⁷³

Miller still stands as good law today and continues to protect children from obscene materials.¹⁷⁴ The narrowing of obscenity law comes not from judicial decision, but from society—and technology—changing.¹⁷⁵ *Miller* sufficiently withstood these changes showing that maximalism can stand the test of time. Though Justice Brennan’s critiques¹⁷⁶ are sufficiently noted, the chilling effect that would have resulted from a minimalist decision instead of *Miller* would have only been worse. The Court’s attempt at a definition of “obscene” in *Miller* was a better guide to lower courts and other actors than a narrow decision would have been.

2. The Fourth Amendment

Similarly, the Fourth Amendment implicates actors outside of the judiciary—namely the police force. The judiciary’s interpretation of the warrant requirement, among others, directly effects how police officers carry out their work. For example, with the invention of new technologies, the Court ultimately determines what level of privacy a citizen enjoys.¹⁷⁷ Justice John M. Harlan II, in his dissent in *United States v. White*¹⁷⁸ stated that “[t]he magnitude of the issue at hand is evidenced not simply by the obvious doctrinal difficulty of weighing such activity in the Fourth Amendment balance, but also, and more importantly, by the *prevalence of police utilization* of this technique.”¹⁷⁹ In general, the early

¹⁷² Chief Justice Burger wrote the *Miller* opinion, and he “loathed pornography.” Stone, *supra* note 151, at 141.

¹⁷³ *Id.* at 142 (“[C]ommunity standards soon became more tolerant of what would once have been regarded as “patently offensive” depictions of sex, and the real-world definition of obscenity shrank down to a small fraction of what had once been thought to be obscene.”).

¹⁷⁴ *Id.* at 143–44.

¹⁷⁵ See *id.* at 143 (“Compared to the 1950s, when any depiction of sex in books, movies, or magazines was tightly constrained, we are now inundated with all sorts of sexually explicit material.”).

¹⁷⁶ Justice Brennan made his critiques known in his *Paris* dissent. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83 (Brennan, J., dissenting). His three main critiques are as follows: “(1) the lack of fair notice, (2) the chill on protected expression, and (3) stress imposed on the state and federal judicial machinery.” Riggs, *supra* note 145, at 252 (quoting *Paris*, 413 U.S. at 93).

¹⁷⁷ See, e.g., *United States v. Carpenter*, 138 S. Ct. 2206 (2018) (cellphone); *Kyllo v. United States*, 533 U.S. 27 (2001) (thermal imaging device); *United States v. White*, 401 U.S. 745 (1971) (radio transmitter).

¹⁷⁸ 401 U.S. 745 (1971).

¹⁷⁹ *Id.* at 770 (Harlan, J., dissenting) (emphasis added).

Supreme Court addressed Fourth Amendment concerns on a case-by-case basis.¹⁸⁰

More recently, the Court recognized the problem with this decision-making strategy. It recognized in *California v. Acevedo*¹⁸¹ that unclear rules and narrow case law “has led to confusion for law enforcement officers.”¹⁸² After this revelation, the Court in *Acevedo* overturned the old rule, which “failed to protect privacy but also had confused courts and police officers and impeded effective law enforcement.”¹⁸³ The Court plainly stated, “[w]e conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers” as set forth in a previous Fourth Amendment case.¹⁸⁴ *Acevedo* presented a seemingly narrow issue,¹⁸⁵ yet it marked a “quantum change in the Court’s attitude toward the warrant requirement.”¹⁸⁶

Before *Acevedo*, two cases “created a somewhat puzzling dichotomy.”¹⁸⁷ *Sanders* came first and held that “if officers possessed probable cause to search only a container, they had to seize the container and obtain a warrant to search it, even if it was located in a vehicle at the time of its seizure.”¹⁸⁸ Three years later, *Ross* stood for the broader proposition that “a warrantless vehicle search on probable cause could extend to any part of the vehicle and to any container discovered during that search—assuming that the object of the search could be concealed inside.”¹⁸⁹ Thankfully, the Court was aware of the importance of its role as a guide in the area of Fourth Amendment law.¹⁹⁰ Instead of simply overruling *Sanders*, Justice Blackmun, through the majority opinion, began chipping away at the “cardinal principle” that warrantless searches are per se

¹⁸⁰ See James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1104 (1992) (“In this area of Fourth Amendment law, the one constant has been dramatic change.”).

¹⁸¹ 500 U.S. 565 (1991).

¹⁸² *Id.* at 577.

¹⁸³ *Id.* at 576.

¹⁸⁴ *Id.* at 579.

¹⁸⁵ Tomkovicz, *supra* note 180, at 1106 (“The only issue actually decided by the Court in *Acevedo* was whether a warrant is needed to search when probable cause is focused solely upon a particular container located within a vehicle.”).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1109 (referring to *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Ross*, 456 U.S. 798 (1982)).

¹⁸⁸ *Id.* at 1109 (citation omitted).

¹⁸⁹ *Id.*

¹⁹⁰ See *id.* at 1111 (“Finally, Justice Blackmun reasoned that the *Sanders* warrant requirement unnecessarily impedes effective law enforcement.” (citation omitted)).

unreasonable.¹⁹¹ Because of the Court's own admission¹⁹² and the frequency of Fourth Amendment issues, it is easy to see why appellate courts should favor maximalist decision-making in this area of the law.

3. Abortion Legislation—A New Maximalist Decision Needed to Settle *Roe*?

Healthcare is a third area of the law that implicates “other actors” into the decision-making rubric of courts. In 1973, the Court in *Roe v. Wade* recognized “a women’s decision whether or not to terminate her pregnancy” as encompassed in the right to privacy in the penumbra of the 14th Amendment—a seemingly maximalist decision.¹⁹³ Broadly, the Court held that states could only prohibit abortion *after* fetal viability.¹⁹⁴ But, the Court did not decide if the right was absolute, and it did not resolve the question of when life begins. In this sense, it was minimalistic. Overall, *Roe* was a maximalist decision because it expanded the right to privacy and provided a clear test for future courts to rely on.¹⁹⁵ At the time, *Roe* seemed to “settle the abortion dispute once and for all.”¹⁹⁶ Though *Planned Parenthood v. Casey*¹⁹⁷ later changed the method of evaluating abortion regulations, *Roe*’s core remained intact.¹⁹⁸

However, *Roe* did not go without criticism.¹⁹⁹ Justice Ginsberg and Sunstein were among those who were left unsatisfied by the Court’s decision.²⁰⁰ The legislatures seem to agree with their evaluation of the case. In the last decade, “legislation restricting rights and access to abortion has been introduced and passed at both state and federal levels at an unprecedented rate.”²⁰¹

¹⁹¹ *Id.* at 1112.

¹⁹² *California v. Avecedo*, 500 U.S. 565, 579 (1991) (“[I]t is better to adopt one clear-cut rule to govern automobile searches . . .”).

¹⁹³ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹⁹⁴ *Id.* at 163.

¹⁹⁵ *See generally id.*

¹⁹⁶ Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 935 (2016).

¹⁹⁷ 505 U.S. 833 (1992).

¹⁹⁸ *Id.* at 845–46.

¹⁹⁹ Devins, *supra* note 196, at 936.

²⁰⁰ *Id.* The common criticism of *Roe* is “that the decision unnecessarily perpetuated counterproductive, divisive backlash by seeking to short circuit the political process and mandate an abortion code generally unacceptable to the nation.” *Id.*

²⁰¹ Elise Andaya & Joanna Mishtal, *The Erosion of Rights to Abortion Care in the United States: A Call for a Renewed Anthropological Engagement with the Politics of Abortion*, 31 MED. ANTHROPOLOGY Q. 40, 40 (2016).

Accordingly, over 50% of all U.S. states have imposed some sort of restriction on abortion.²⁰² Since 1983, states have increasingly enacted abortion restrictions, from a rate of 14 restrictions per year from 1983–2010 to an average of 57 restrictions per year from 2011–2015.²⁰³ In 2007, the Court came out with another abortion decision upholding the right to an abortion in some cases, requiring access to some procedures to “preserve the life and health of the woman.”²⁰⁴ Yet, as of 2016, 17 states attempted to overcome this by restricting later-term abortions altogether.²⁰⁵ In 2019 alone, seven states adopted abortion bans in clear violation of *Roe* and *Casey*.²⁰⁶

Roe and *Casey* (“the abortion cases”) left some questions unanswered. The Court declined to say when human life begins.²⁰⁷ Because of this minimalist aspect of the abortion cases’ opinions, states and other organizations are left on their own to answer this question.²⁰⁸ For example, an article in *Medical Anthropology Quarterly* is a “call to action” for anthropologists to research and enter into the “debates around gender and personhood.”²⁰⁹ The recent “anti-abortion movements in the majority of U.S. states”²¹⁰ have also attempted to define personhood and when life begins.²¹¹ Nine states have seemingly violated the abortion cases and attempted to define a fetus as a person.²¹² One scholar

²⁰² *Id.* at 40–41 (Restrictions can include “one or more of the following: (1) impose restrictions on abortion providers through the Targeted Regulation of Abortion Providers (TRAP) laws; (2) mandate wait times, ultrasound viewings, and/or reading of legislator-written scripts about fetal development prior to receiving an abortion; and (3) reduce the gestational age for legal abortion.”).

²⁰³ Rebecca B. Reinhold & Lawrence O. Gostin, *State Abortion Restrictions and the New Supreme Court: Women’s Access to Reproductive Health Services*, 322 J. AM. MED. ASS’N 21, 21 (2019).

²⁰⁴ Andaya & Mishtal, *supra* note 201, at 46.

²⁰⁵ *Id.*

²⁰⁶ Reinhold & Gostin, *supra* note 203 (naming Alabama, Georgia, Kentucky, Louisiana, Mississippi, Missouri, and Ohio).

²⁰⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

²⁰⁸ Andaya & Mishtal, *supra* note 201, at 40. Andaya and Mishtal point out that growing attention and concern for the effects of medical procedures on the fetus reflect the growing popularity of “fetal personhood.” *Id.* at 42 (“While not studies of abortion per se, these findings underscored how scientific and medical processes are deeply implicated in the cultural construction of fetuses as persons with the rights outside of, and even in opposition to, those of pregnant women. Assertions about fetal personhood in turn shape the terrain on which arguments about the morality of abortion are waged, shaping policy and popular attitudes toward pregnancy and termination.”).

²⁰⁹ *Id.* at 40–41.

²¹⁰ *Id.* at 41.

²¹¹ Reinhold & Gostin, *supra* note 203.

²¹² *Id.* (“Beyond direct abortion regulations, 9 states extend personhood to preivable fetuses, defining ‘person’ to include an ‘unborn child.’”).

even praised *Casey* “for recalibrating abortion rights” to align with “prevailing views of popular opinion and elected official preferences.”²¹³

So what historical context is necessary in the area of abortion for a maximalist decision to succeed? Looking to the political context, “any theory of constitutional rights moored to an understanding of the political process must take recent developments into account.”²¹⁴ Particularly for this discussion, it is important to realize that “today’s political dynamic is far different than the political dynamic in 1973 (when *Roe* was decided) or 1992 (when *Casey* was decided).”²¹⁵ Looking beyond the political system, in a study of reproductive governance, some anthropologists seem to think “[t]he relationship of abortion to modernity was not only a question of demography; many state socialist nations also linked the legalization of abortion to the expansion of women’s rights.”²¹⁶ Additional factors include “constrained national and familiar economies, women’s participation in higher education and employment, and changing gender and kinship norms,” which fuel “desires for smaller families that are achieved through both contraception and abortion.”²¹⁷

Is the historical context of 2020 ready for a maximalist decision?²¹⁸ Probably not.²¹⁹ Despite attempts, as of 2016, “movements to legally establish fetuses as persons from conception have failed in every state where the policy has been introduced.”²²⁰ Even from the public eye, “polls have revealed a slight but noticeable decline in support for legal abortion as compared with polls conducted two decades ago.”²²¹ Suzanna B. Goldberg, a law professor at Columbia, sees it this way, “we live in a society that now seems more receptive

²¹³ Devins, *supra* note 196, at 937; *see generally* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996).

²¹⁴ Devins, *supra* note 196, at 937. Such “political developments” in 2016 included “party polarization and the related rise of the Tea Party” among other things. *Id.*

²¹⁵ *Id.*

²¹⁶ Andaya & Mishtal, *supra* note 201, at 42.

²¹⁷ *Id.* at 42–43.

²¹⁸ This Note does *not* intend to predict the likelihood or potential results of overturning *Roe*. For such an article, see for example Kimberly Leonard, *What Happens If Roe v. Wade Gets Overturned?*, WASH. EXAM’R (July 17, 2018), <https://www.washingtonexaminer.com/policy/healthcare/what-happens-if-roe-v-wade-gets-overturned>. *See also* Reinhold & Gostin, *supra* note 203.

²¹⁹ *But see* Devins, *supra* note 196. Devins argues that reliance on the political process is misplaced, and the Court is the only actor suitable to settle this dispute. *Id.* at 936. This Note, however, disagrees and argues that when political actors implement the Court’s decisions, it is necessary to come to more of an agreement before the Court issues a maximalist decision intended to be the “be all end all.”

²²⁰ Andaya & Mishtal, *supra* note 201, at 46.

²²¹ *Id.* at 48.

to gay rights than women's rights generally."²²² The Court "sidestepped"²²³ significantly interfering with *Roe v. Wade*, or issued a minimalist opinion, in a recent 2019 case.²²⁴

If the Supreme Court issues a maximalist decision now, both the Court and the decision may face criticism. And, the decision is more likely to be overruled in the future. Though, note that a maximalist decision does not require overturning the abortion cases. Some scholars actually predict that overturning is unlikely, and a significant limit on the precedent is much more likely.²²⁵ Perhaps Judge Sutton's strategy is not a bad one here: wait for the states to figure it out and determine the best strategy based on that.²²⁶ In fact, his criticism of *Roe* is that it decided the issue for the entire country while the country was not yet ready for such a defining maximalist decision.²²⁷ The states have yet to come to a consensus and the consequences are yet to be discovered. Once the dust settles, then the Supreme Court may be in a better position to issue a maximalist decision that can act as a guide for subsequent cases and state actions.

Like in *Brown*, maximalist decisions may be followed by a series of minimalist clarifications, but the appropriate use of maximalism is likely to increase the use of stare decisis and less likely to increase overturned decisions. Applying that reasoning to the current challenges to *Roe*, it is likely that the Court will need to eventually use maximalism to clarify, change, or support *Roe*, but not yet. That decision will come when the historical context is ready, which may not be 2020 or even 2021.

B. Mini-Maximalism—The Use of Maximalism After Minimalism

Sunstein identifies what factors determine when judicial minimalism is appropriate, outlined above. However, it is necessary to identify factors that determine when a maximalist decision will be effective.²²⁸ So, what factors

²²² Adam Liptak, *Justices' Rulings Advance Gays; Women Less So*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/us/as-gays-prevail-in-supreme-court-women-see-setbacks.html>.

²²³ Adam Liptak, *Supreme Court Sidesteps Abortion Question in Ruling on Indiana Law*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/us/politics/supreme-court-abortion-indiana.html>.

²²⁴ See *Box v. Planned Parenthood*, 139 S. Ct. 1780 (2019).

²²⁵ Reinhold & Gostin, *supra* note 203.

²²⁶ See generally SUTTON, *supra* note 52.

²²⁷ *Id.*

²²⁸ An effective maximalist decision provides a clear and just judgment while clarifying the law for use in subsequent cases. These maximalist decisions will guide lower courts and reduce or eliminate the need for appeals because agreement precedes an effective maximalist decision.

should be considered in deciding if a court should use maximalism when issuing a decision?

To start, a court should consider whether information has been gathered. A maximalist decision should come after information has been gathered.²²⁹ Minimalism is a starting point. Courts should initially embrace minimalism and decide cases narrowly until democracy has peaked.²³⁰ This means that courts address issues of first impression minimalistically, then once uniformity is needed and the consequences of an intended strategy have been revealed, appellate courts can use their jurisdiction and power to issue maximalist decisions. The use of “mini-maximalism”²³¹—the path from deciding an issue on a case-by-case basis to issuing a broad, guiding decision—could strike the perfect balance between an increasing caseload and justice in future cases.

Another factor in deciding whether a maximalist path is appropriate is “the frequency with which the information will be used.”²³² When a topic is highly contested by the public, minimalism will provide a more just result,²³³ at the expense of frequent litigation. For example, contention is evident in the area of abortion law today. Recent attempts by states to enact strict abortion statutes clearly prohibited by *Roe* and its successors exemplify the need for perhaps another maximalist decision in this area of the law.²³⁴ It is as simple as this: more contention, more cases. Therefore, using a maximalist approach is most effective when public agreement and justice align with the judgment rendered.

Third, the degree of state involvement is a factor in determining if the time is right for a maximalist decision. As Judge Sutton points out, if states are particularly interested in an issue, they have the power to enact legislation on the matter, and if the Supreme Court decides a case against them, then subsequent

²²⁹ In an economic evaluation of rules and standards, Kaplow concludes that “[w]hether a law should be given content *ex ante* or *ex post* involves determining whether information should be gathered and processed before or after an individual’s act.” Kaplow, *supra* note 37, at 585. This concept is directly analogous to the minimalist/maximalist debate.

²³⁰ The peak of democracy goes something like this: The peak comes when states have been laboratories and legislatures have experimented with the issue and attempted to address it. After several states have tried various approaches, and the consequences of those actions are known, courts can then choose the most effective solution. At this point, issuing minimalist opinions does nothing. Maximalist decisions would increase uniformity and hopefully compliance. Powers may be abused less, and oversight becomes possible across borders.

²³¹ Credit to Blake N. Humphrey, 2021 J.D. Candidate at West Virginia University College of Law, for the nomenclature.

²³² Kaplow, *supra* note 37, at 585.

²³³ See *Beyond Minimalism*, *supra* note 16, at 841 (arguing that “[u]sually it would be much better to have a just outcome, rejected by many people, than an unjust outcome with which all or most agree”).

²³⁴ See *infra* Section III.C.3 for an analysis of this issue.

case law in the lower courts can increase in number.²³⁵ State-specific legislation results, and national unity is decreased. Therefore, a consideration in determining whether a court should use minimalism or maximalism to render an opinion should encompass the idea that states can “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²³⁶ If state action is preferred, courts should choose minimalism. After states have tested a system or theory, then the Supreme Court may adopt a similar approach. This allows the Court to render an opinion while already knowing the risks and advantages from seeing them play out in the different states.²³⁷ Such opinions should reduce fear of the unknown for minimalists and also please maximalists by allowing for a clear rule that provides guidance to lower courts. On the other hand, if a more uniform approach is needed or if a judgment is clearly favored, maximalism is the answer.

1. Recent Title VII Decisions

The recent cases of *Bostock v. Clayton County*²³⁸ and *Our Lady of Guadalupe School v. Morrissey-Berru*²³⁹ provide great examples of the need for mini-maximalism. First, *Bostock* lends itself to future litigation and is not the maximalist decision to settle all case law in this area. The Court even said that itself. On the other hand, *Morrissey-Berru* might not have been needed if its predecessor case had been more clearly defined. Each case is addressed in turn.

Bostock stems from Title VII of the Civil Rights Act of 1964, which protects employees from discrimination based on their sex.²⁴⁰ In this consolidated case,²⁴¹ Gerald Bostock worked as a child welfare services coordinator in Georgia.²⁴² While working there, Gerald started playing in a gay recreational softball league.²⁴³ After his employer discovered this hobby, Gerald’s employment was terminated for conduct “unbecoming” of its

²³⁵ SUTTON, *supra* note 52, at 2.

²³⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²³⁷ See generally SUTTON, *supra* note 52.

²³⁸ 140 S. Ct. 1731 (2020).

²³⁹ 140 S. Ct. 2049 (2020).

²⁴⁰ 41 U.S.C.A. § 2000(e) (West 2020).

²⁴¹ Gerald Bostock’s case out of the Eleventh Circuit was consolidated with its Second Circuit counterpart, *Altitude Express Inc. v. Zarda*, 883 F.3d 100 (2018). The case of *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2017), was also covered by the Court’s decision in *Bostock*.

²⁴² *Bostock*, 140 S. Ct. at 1737.

²⁴³ *Id.*

employees.²⁴⁴ Bostock filed a discrimination suit against his employer soon after his termination. Both the district court and the Eleventh Circuit agreed that Title VII does not support a cause of action for discrimination based on sexual orientation.²⁴⁵ The issue was then presented to the Supreme Court of the United States; does the word “sex” in Title VII include sexual orientation and/or gender identity?²⁴⁶

The Court answered in the affirmative, seemingly expanding the reach of Title VII. The Court had previously addressed what was covered under the term “sex” in Title VII in a series of three cases.²⁴⁷ In these minimalist cases, the court decided that each narrow scenario individually fell under the protection of Title VII. *Bostock* uses and expands these minimalist decisions and is more encompassing. The Court acted on its own in expanding the reach of Title VII and did not wait for the legislature to explicitly write “sexual orientation” into Title VII. However, *Bostock* is not quite a maximalist decision that will prevent subsequent litigation. The following excerpt from the Court’s opinion addresses this “concern”:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under the provisions of Title VII are questions for future cases, not these.²⁴⁸

Employers were obviously concerned about the reach of this decision, but the Court expressly limited the reach of its decision. Still, *Bostock* is more than a minimalist decision; it is a step toward maximalism. Considering the factors above, perhaps the Court felt comfortable deciding *Bostock* more broadly than the previous trio of cases because, since Title VII’s passage, states have

²⁴⁴ *Id.* at 1738.

²⁴⁵ *Id.* at 1754.

²⁴⁶ *Id.* at 1739.

²⁴⁷ See generally *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (extending *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and including same-sex sexual harassment under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (including gender stereotyping as a form of unlawful discrimination); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (encompassing sexual harassment under Title VII).

²⁴⁸ *Bostock*, 140 S. Ct. at 1753.

provided protections of their own to the LGBTQ+ Community.²⁴⁹ States such as California,²⁵⁰ Maryland,²⁵¹ and Wisconsin²⁵² have explicitly written “sexual orientation” into their state codes, effectively protecting the class from workplace discrimination.

Bostock seems like a bold, bright-line rule. These state laboratories have given the Supreme Court the opportunity to see the consequences of including sexual orientation as a protected class; information was gathered *before* the Court expanded protection. The creation and enactment of state legislation also represents the high level of interest in this topic. Whether intended or not, *Bostock* increased national unity and exemplifies the use of and need for minimalism. The trio of cases preceding *Bostock* were minimalist decisions which laid the foundation for the Court to issue broader decisions. Though *Bostock* is not the maximalist decision to end all future litigation, it is a first step to increasing the reach of case law to decrease future case load.

As another example of the need for maximalism, *Morrissey-Berru*, might not have been needed if its predecessor case had been more clearly defined. *Morrissey-Berru* concerns the ministerial exception to federal anti-discrimination laws.²⁵³ This was not the first case to address this exception, though. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*²⁵⁴ first recognized an exception for ministers, preventing religious institutions from being subjected to anti-discrimination laws when hiring ministers.²⁵⁵ The Court in *Hosanna-Tabor* familiarly limited the scope of its decision and was explicitly reluctant “to adopt a rigid formula for deciding when an employee qualifies as a minister.”²⁵⁶ Because the Court chose minimalism in 2012, it had to interpret who qualifies as a minister in its 2020 *Morrissey-Berru* decision. The Court in this later decision ultimately followed and expanded its approach in *Hosanna-Tabor* by granting the Our Lady Guadalupe School an exception to anti-discrimination laws, classifying Agnes Deirdre Morrissey-Berru as a minister.²⁵⁷ Once enough minimalist decisions build to create enough case law to provide a just result in

²⁴⁹ By 2019, 21 states had included LGBT employees as a protected class for employees. Katherine Carter, *Questioning the Definition of “Sex” in Title VII: Bostock v. Clayton County, GA*, 15 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 59, 59 (2020).

²⁵⁰ CAL. GOV’T CODE § 12940 (West 2020).

²⁵¹ MD. CODE ANN. § 20-601(h) (West 2020).

²⁵² WIS. STAT. ANN. § 111.36 (West 2020).

²⁵³ 140 S. Ct. 2049 (2020).

²⁵⁴ 565 U.S. 171 (2012).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 190.

²⁵⁷ *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.

all similar cases, a maximalist decision simplifies and decreases appellate courts' caseloads.

C. *The Numbers*

In general, the number of cases commenced in federal trial courts in the United States has steadily increased since the early 1900s.²⁵⁸ Even as late as 1970, the number of private suits commenced in federal district courts registered well below 100,000 cases; in fact, only 62,356 cases were reported.²⁵⁹ There was a rapid increase in the next 15 years with the caseload almost doubling; in 1985, 156,182 private suits were commenced in federal district courts in the United States.²⁶⁰ Another 15 years passed, and in 2000, an even higher 188,408 commenced cases were reported.²⁶¹ In the latest 15-year interval, 237,453 cases were reported in 2015.²⁶²

Why are these numbers important? If these numbers continue to increase, courts will need a different approach to effectively deal with the increasing number of cases. At the trial court level, these numbers could be affected by new technology or the increasing population. Such problems creating litigation often cannot be solved in advance. Courts can, however, implement maximalist decision making to minimize the number of cases that *could* be solved by previous decisions of the court.

If uncertainty is left unresolved at the appellate level, lower courts are left without guidance, only having narrow and shallow precedent which can hardly be classified as binding. Case-by-case decision making does nothing to help the next court and the next case down the line. Minimalists are concerned about the costs of error, but their actions drive up the cost of making future decisions. Trial courts alone cannot set binding precedent, which is needed for an effective maximalist decision to decrease the number of subsequent cases dealing with a particular matter. Thus, appellate courts must be involved.

The statistics from United States Courts of Appeals are even more interesting. From its origins in the late 1800s until the 1960s, the caseload of the courts of appeals steadily increased.²⁶³ From the 1960s until the mid-2000s, there was a rapid increase in cases commenced in federal courts of appeals.²⁶⁴ In 2005,

²⁵⁸ *Trial Court Caseloads Since 1870*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/trial-court-caseloads-1870> (last visited Oct. 9, 2020).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

the number of cases commenced peaked at 68,472—up more than 17 times from the 3,899 cases commenced in 1960.²⁶⁵ If this number continues to increase as the trend indicates,²⁶⁶ a solution is necessary. That solution is properly implicated judicial maximalism.

Maximalism is not appropriate when courts are addressing issues of first impression. But maximalism is especially appropriate in areas of the law in which other actors rely on the judiciary to output clear, helpful guidelines which must be followed. When justices output judgments with a very shallow opinion, those opinions do not set broadly applicable precedent. This creates more work for lower courts because shallow opinions do not decide the next constitutional challenge within the same subject. The lack of case law that applies across a subject impedes a timely resolution of subsequent cases and further slows the wheels of justice. A maximalist decision allows progression among a subject and efficiency among lower courts.

IV. CONCLUSION

In some cases, minimalism is a starting point. But eventually, an answer with some finality is necessary. That answer comes in the form of a maximalist decision. A maximalist decision clarifies existing case law, while preventing the need for further case law on the topic at hand. In other cases, maximalism is called for to clarify and broadly interpret the law so that other actors outside the judiciary can appropriately abide by it. While not all challenges can be prevented or even foreseen, maximalism may help address the growing number of suits commenced in United States federal courts. The scope of a decision can increase or decrease the number of subsequent cases. Maximalists take the better approach when it comes to the scope of an opinion. Minimalists focus so much on narrowing the scope that future case law suffers.

There are certainly exceptions to this rule. Maximalism in some cases may create more of a need to overturn case law when the historical climate changes, though maximalists do generally adhere more strongly to *stare decisis* than do case-by-case minimalists. Minimalism provides a less specific but perhaps better suited answer to individual, “quirky” legal questions. Yet, maximalism provides more transparency and more guidance to lower courts on subsequent cases within the realm of the maximalist decision, thus decreasing the need for appeals and potentially even the number of cases filed by providing clearer guidance to the public. In advocating for maximalism, it is important to

²⁶⁵ *Id.*

²⁶⁶ *Id.* Though, after its peak in 2005, the caseload of courts of appeals has appeared to decrease. This Note assumes that the peak may be followed by a short decrease but will eventually continue the exponential climb toward a steadily increasing caseload—following the long-term trend rather than the short-term.

remember Anderson's distinction²⁶⁷ that minimalism, or maximalism, ideally only affects *opinions* and not judgments. Therefore, the outcome remains the same in each individual case, but the process becomes more efficient with the use of a correctly timed maximalist decision.

*Lauren Cyphers**

²⁶⁷ See *supra* Part II.

* J.D. Candidate, West Virginia University College of Law, 2021; Bachelor of Science in Mathematics, West Virginia University Eberly College of Arts and Sciences, 2018; Executive Editor, Volume 123 of the *West Virginia Law Review*. The Author would like to thank her peers on the West Virginia Law Review for their very hard work on this Article and on each Issue of Volume 123. Any errors contained herein are the Author's alone.